Geoffrey
Sawer

Australian Government Today

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AUSTRALIAN GOVERNMENT TODAY

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PREFACE

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GEOFFREY SAWER

Canberra, September 1956

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Australian Government Today

1. *Introduction*

THE COMMONWEALTH OF AUSTRALIA IS A FEDERATION OF SIX states, in which the power to govern is divided between seven independent parliaments—those of the states sitting at Sydney, Melbourne, Brisbane, Adelaide, Perth and Hobart, and the federal parliament sitting at Canberra. This system, adapted from the constitution of the U.S.A., makes for 'weak' government ; it reduces the possibility of resolute and uniform government policy being applied over the whole of the continent, since on many matters of national importance the seven parliaments would have to act in concord if uniformity and resolute action were to be achieved. For reasons which will be explained later, constant agreement between all the houses of all the parliaments is unlikely. However, from another point of view this arrangement can be regarded as providing the citizen with some protection against 'over-government'. But the constitutions under which these seven parliaments work all embody the principle of responsible cabinet government, under which the supreme executive is a group of members of parliament chosen from the party or coalition having a majority in the lower house. This system, adapted from the British constitution, makes for 'strong' government within the several spheres of action of the seven parliaments, since it gives to a small and more or less agreed body of men the power to obtain legislation in accordance with their policy, and to supervise the carrying out of that policy by executive officials. This again may be looked at from another point of view and condemned as tending to produce 'over-government'. There are many other contradictions in the system of government which the Australian people have been evolving in their development from a British convict settlement to a sovereign nation state of the British Commonwealth. Some of these contradictions are due to borrowing from different sources, some to historical survivals. Australians have a reputation in the world as advanced and even aggressive democrats : indeed, they have been pioneers in the use of such democratic measures as the secret ballot, universal suffrage, votes for women, payment of members of parliament and compulsory voting. But three of the state parliaments have upper houses representing less than half the adult population of those states, and in three of the states the electorates are so arranged as to give rural dwellers greater individual voting strength than that possessed by dwellers in the capital cities. Australia is a sovereign nation for the purposes of international law; it was

in its own right an original member of the League of Nations, has become an original member of the United Nations Organisation in like manner and was a first member of the United Nations Security Council, and possesses its own independent diplomatic and consular service. But Australia is also a loyal member of the British Commonwealth of Nations, a relationship symbolised by allegiance to the Queen of Great Britain and having important practical consequences in law, commercial and defence policy and diplomatic activities. These and other contradictions or anomalies in the constitutional structure of the Australian Commonwealth have given its people ample opportunity for practising the gift for compromise which is said to be the political heritage of the English-speaking peoples. Some institutions may be discarded, but most of them will go to the making of a distinctive national synthesis.

One point of word usage. In Australian statutes and official documents, the adjective 'Commonwealth' is habitually used to describe federal institutions and powers—the 'Commonwealth' parliament, the 'Commonwealth' civil service and so on. But in some documents—for example the introductory sections of the federal constitution—and in common speech, the noun 'Commonwealth' is often used to describe the whole complex of state and federal institutions, the economic and social life, the emerging culture and everything else which makes up the Australian nation. Federal politicians sometimes, in the heat of argument, speak as if Australian nationalism was an appendage of the federal government and fostered only from Canberra, the federal capital. Perhaps a federal minister had this idea in mind when he enquired at a Premiers' Conference whether the states attended as neutrals or as enemy aliens. Such an appropriation of the national implications in the word 'Commonwealth' is constitutionally unjustifiable and is unfair to the states, whose education systems instil national sentiment. To avoid both the unfairness and the ambiguity, this book uses the word 'Federal' instead of 'Commonwealth' to describe the institutions and activities created and authorised by the federal constitution.

2. *The Federal Compact*

Until 1901, 'Australia' was merely a geographical term. The continent and adjacent islands contained six British colonies—New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania—each of which possessed within its own boundaries, under constitutions created by British acts of parliament, the power to 'make laws for the peace, welfare and good government' of its people 'in all cases whatsoever'. Under the spur of external

danger and some domestic inconveniences—the chief being internal tariff walls—these six colonies agreed to federate, and the bargain was given legal form by another British act of parliament, the Commonwealth of Australia Constitution Act, which was passed in 1900 and became effective on 1 January 1901. The terms of the federal compact were that the colonies should as states in the federation retain their existing constitutions and complete apparatus of government; that a new central authority should be created with Australia-wide authority, similarly equipped with parliament, executive, judiciary and the subordinate machinery of government; that the states should retain a general unspecified legislative power, qualified only by the grant to the new federal authority of a specific list of powers; and that the courts should police the whole system.

The federal character of Australia obtrudes itself on the most casual visitor. He will soon find that while the Australian armed forces wear standard uniforms, those of the police forces vary from state to state. He will find that while an entry permit issued by the federal Department of Immigration is valid for all states, a motor driving licence and car registration issued in one state is not of itself valid in other states.[1] He may travel on railways owned by the states, and railways owned by the federation, and will have to change trains from time to time because these railways have been built to different gauges. If he inspects a great industrial establishment, such as the Newcastle Steel Works, he will find men working side by side, some of whose working conditions are regulated by federal industrial tribunals, others by state industrial tribunals. If he draws a cheque he will find the law governing its form and legal effect in a statute of the federal parliament, and if he posts it it will be carried by a postal organisation run by the federal government. But to be valid, the cheque must carry a tax stamp of the state in which it issues, and the legality of the transaction which led to the cheque being issued will probably be governed by state law. If he decides to marry in Australia, the ceremony will be governed by state law, but its effect on his wife's nationality will be governed by federal law. All this will seem natural enough to the visitor from the United States of America, but it may puzzle the Englishman. The Australian has grown accustomed to dealing with two different sets of statutes, regulations and officials—in addition, of course, to the by-laws and officials of local government authorities.

The founders of the Australian constitution did not expect their system to make the structure of Australian government unduly com-

[1] All states now permit motorists visiting from other states to operate for limited periods on the car registration and driving licence of their state of origin.

plex. The specific powers given to the new federal parliament, executive and judiciary seemed limited in scope. The most important were the control of foreign and interstate trade, taxation and in particular the imposition of customs and excise duties, migration, foreign affairs and the defence of the Commonwealth from external aggression. The federal parliament was also empowered to make laws on subjects with respect to which uniformity seemed desirable —weights and measures, negotiable instruments, bankruptcy, copyrights and patents, naturalisation, company law, marriage and divorce, currency and coinage—and to take over or establish various social services—posts, telegraphs, weather bureaux, lighthouses, census and statistical bureaux, invalid and old age pensions. Most of the powers given to the federal parliament are contained in the forty sub-heads or *placita* of Section 51 of the federal constitution. They contain some matters, not mentioned above, which have since acquired an unexpected importance, and which will be referred to later.

With respect to most of the matters referred to it, the federal parliament was not even given exclusive powers. Its exclusive powers are confined to defence,[1] customs and excise duties, currency and coinage, external affairs other than certain inter-imperial relations, federal territories and the control of the federal public service. On other matters of federal power, the states retain a concurrent legislative power. A valid federal law overrides any inconsistent state law. The recent tendency of the courts has been to treat 'inconsistency' as requiring something like head-on collision between the two laws; for instance, a state law requiring all marriages to be performed in churches, and a federal law prohibiting marriage in church—(there are no such laws, of course)—or a state law prohibiting the driving of a car at more than forty miles an hour and a Commonwealth law authorising defence personnel to exceed that speed. But it is also possible for the federal parliament to state or imply that its laws on a particular matter constitute an exclusive code, so that *any* state laws on the matter become inoperative; the High Court has so treated federal industrial arbitral awards. However, clashes between federal and state legislation have not been numerous; the two sets of legislation have on the whole harmoniously supplemented each other, like common law and equity in the English legal system. The federal parliament has not exercised all the powers given to it by the federal constitution. It has passed no laws with respect to marriage[2] or company law, and only a very limited divorce measure, although on

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[1] Strictly, the raising and control of the armed forces. In the wider sphere of 'total war' activities, such as price control, the states have concurrent power.

[2] Other than its possible effect on the nationality of the wife.

all these matters Australian uniformity is badly needed. The federal government has not even completely equipped itself as a government, since although it possesses a small police force,[1] it relies chiefly on the state authorities for law enforcement—a state of affairs which caused it considerable embarrassment when the government of New South Wales defied federal law in 1932.

Notwithstanding what is said above, the federal government has steadily increased in power and importance since 1901, and the constitutional structure of Australia has grown much more complicated than the 'Federal Fathers' intended. Why ?

3. *The Changing Constitution*

The people of Australia have shown a marked aversion from changing the federal constitution. Of twenty-one amendment proposals[2] submitted to them in the first fifty-four years of federation, only four were carried ; the three most important ones related to the assumption of state debts by the federal government, financial agreements between the seven governments and extension of federal social services. But changes in judicial interpretation and economic facts have done more than the people have been willing to do.

The High Court of Australia was created directly by the federal constitution ; appointments are made by the federal government, and the Justices are subject to removal by the federal parliament only. However, the Court was designed, like the U.S. Supreme Court, to stand above both state and federal authorities and police the constitution. Even the traditional appeal to the Judicial Committee of the Privy Council in London has been modified so as to make the High Court the final arbiter on the most important federal constitutional questions.[3] In Australia, as in the U.S.A., experience has shown that a court interpreting a complex and often obscurely worded constitutional document becomes of necessity a kind of legislator. The Australian politician has to consider not only the possible view

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[1] Each state has a centrally organised police force, and these freely collaborate with each other. There are no municipal or county police. The federal government's regular police are called 'peace officers', and there is also a federal 'Security Service' to deal with sedition, espionage, etc. ; but there is no federal service performing the co-ordinating functions of Scotland Yard and the U.S. Federal Bureau of Investigation in the field of ordinary law enforcement.

[2] This is the number of constitutional referenda held, excluding the plebiscites on conscription in 1916 and 1917 which had nothing to do with constitutional amendment. The twenty-one referenda Acts contained more than forty separate proposals—just how many is a matter of opinion, since it is not always easy to draw the line between 'substantive' and 'incidental' provisions.

[3] The High Court may itself permit appeals to the Privy Council on such questions, but up to 1956 had done so only once.

of the electorate, of the state parliaments and of the federal parliament. He also has to consider the possible view of the High Court on a proposed measure, and this last view might be the most difficult of all to predict.[1]

The general trend of High Court interpretation has been to increase the power of the federal government. The industrial arbitration and conciliation power, intended by the 'Federal Fathers' to deal with nomadic workers such as shearers and seamen, has been interpreted by the High Court as extending to any dispute between a union organised in more than one state with employers in more than one state, and a 'dispute' is created by the mere refusal of a genuine industrial demand. Further, this power extends to disputes between state governments and instrumentalities and their 'industrial' employees, which lessens the ability of the states to control their own expenditure. 'The naval and military defence of the Commonwealth' has been interpreted in time of war as including the control of almost every phase of the national life, from industrial and military conscription to fixing the price of bread. The external affairs power probably authorises legislation necessary to give effect to any treaty or international convention, though this point is not finally settled. The federal power to tax includes the power to give federal taxes priority in collection, so that the federal parliament can saturate the taxable capacity of the people, leaving nothing for the states. Of course, High Court decisions have not invariably favoured federal power; thus the Court has not permitted to the federal parliament an unlimited capacity to spend money, so that it cannot under the 'appropriation power' embark on the nationalisation of industries or unlimited social services.[2] The Privy Council, in one of its rare incursions into Australian constitutional law, held that the federal government, like the states, is prohibited from interfering

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[1] The importance of judicial decisions in politics was dramatically illustrated by the course of federal politics from 1947 to 1951. In 1947, the High Court held invalid a key section of the federal Banking Act of 1945, embodying the banking policy of the Chifley Labor government. The government sought to overcome the difficulty by nationalising the private trading banks, but the relevant Act was in turn held invalid by the High Court and the Privy Council, and the whole dispute contributed materially to the defeat of Labor at the general election of 1949. The Menzies-Fadden Liberal-Country Party coalition then elected had as its key policy legislative dissolution of the Australian Communist Party, without judicial trial, but the relevant Act was held invalid by the High Court in 1950, and in 1951 the electors rejected a referendum designed to overcome this decision.

[2] The constitutional amendment passed by the referendum of 1946 authorises the Commonwealth to carry on a wider range of social services, but does not affect the general principle that it can spend money only on activities authorised by the federal constitution.

with freedom of interstate trade and commerce. The High Court has even invalidated a few federal war-time regulations. But the general trend has been to read into the words of the founders a width of meaning which many of them did not contemplate.

Economic facts have worked the same way. From the beginning, the federal government has been well placed financially. It has a monopoly of customs and excise duties—in peacetime a prolific and painless source of government revenue. To these it has added income-tax, pay-roll tax and sales tax.[1] The financial position of the states, on the other hand, has steadily deteriorated. They have until recently carried the main burden of development and social services. Their railways, however necessary to development, have been a heavy financial strain, increased by the growth of competitive motor traffic. South Australia, Tasmania, and Western Australia have been especially dependent on the fluctuating overseas market for primary products, and their difficulties have been increased by inclusion within the federal high-protection tariff wall; so much so that they have a special status in federal finance—that of 'claimant states'—and receive special federal subsidies, supervised by a quasi-judicial federal Grants Commission, to maintain their social services at a minimum level. But all the states depend for their solvency on federal grants. During the first ten years of federation, these grants were regulated by the federal constitution itself. Since then, they have been in the discretion of the federal parliament, which can impose conditions, and the practice has grown of making grants on conditions which control state administration. In 1928, the federal government surrendered some of its potential control by conditional grants; it converted the major part of its subsidy to the states into a regular unconditional contribution to state loan indebtedness. But enough in the way of grants for special purposes remained to be of critical importance to the state budgets.

In 1942, judicial interpretation and economic facts combined to establish the financial supremacy of the federal authority. As a temporary war-time measure, the federal parliament imposed a high rate of federal income tax, gave that tax priority in collection over the state income taxes, and made provision for some reimbursement to the states of what they would have collected in income tax—on condition that they imposed no state income tax. This scheme was upheld by the High Court in all its parts. Hence the federal authority now has a treble advantage over the states—superior sources of revenue, priority in concurrent sources of revenue, and the ability to

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[1] And many other taxes associated with market stabilisation schemes, such as the flour tax. The federal government also imposed land tax from 1910 to 1952, and entertainment tax from 1916 to 1953.

make grants from its full purse conditional on what it considers satisfactory state administration. The Prime Minister expressed the relative financial position of the federation and the states at the Premiers' Conference of January 1946, when he brusquely informed the state Premiers that the single Commonwealth income tax would be continued indefinitely, and described their unanimous objections as 'all —— nonsense'.[1]

It is still true that in peacetime, most of the law governing the ordinary relations of Australian citizens with each other, and most of the instrumentalities for enforcing that law, derive from the states. But in Australia, governments play a very positive part in the life of the citizen by the provision of social services and the conduct of public utilities, and the major political struggles take place over these matters. It is in the field of services that the Commonwealth by a combination of legal powers and financial strength is steadily extending its hold. It is still true that the states are completely organised to carry on the work of the government, but the power of the purse is tending to subject them in their positive activities to policies initiated by the federal authorities.

4. *Co-operation between the Federal and State Governments*

Since the 'Federal Fathers' expected the federal and state governments to operate in different spheres, it did not occur to them to create in the federal constitution any formal methods by which federal and state authorities could reach or execute common policies. However, in the early days of federation, it was found necessary to supplement the founders' scheme by other institutions. The first of these supplementary institutions is the Premiers' Conference, which has no formal rules of organisation or debate, no separate secretariat, and is nowhere regulated by Australian constitutions or statutes.[2] Before the first World War, these conferences were dominated by the state premiers, and rotated around the state capitals. Commonwealth representatives were invited only if the agendum required their presence. The premiers sought common policies on such matters as health laws, reciprocal recognition of motor car registrations and driving licences for interstate visitors, and so forth. As federal power has extended, the federal government has come to

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[1] As reported in the *Argus* (Melbourne), 23 January 1946. The major parties are divided on this issue, although the Liberal and Country Parties are theoretically more sympathetic to state claims than is Labor. In 1951, a conference of state and federal treasury officials recommended that the states should resume the imposition of income tax, and in 1956 Victoria commenced legal action (not yet heard at this writing) to have the system declared invalid.

[2] It is mentioned in some statutory preambles.

dominate the conferences. They are now held at least once a year in Canberra, are usually summoned by the federal Prime Minister—though state premiers can ask him to summon a meeting—and the federal Prime Minister occupies the chair. The federal Prime Minister's Department provides a secretariat, and prepares and circulates the agendum, the items being suggested by the state and federal governments. The federal government is usually represented by six or seven ministers, backed by an array of departmental experts; each state is usually represented by its premier and at the most one other minister, backed by another group of departmental experts. The discussions are sometimes held in the presence of the press, sometimes not, in accordance with the political delicacy or strategic secrecy of the matters discussed. The varying practice with respect to the press illustrates the ambiguous character of the Premiers' Conference. At times it is like another national parliament whose proceedings ought to be public—for example, in deciding to unify the gauge of Australian railways (conference of January 1946).[1] At other times, the conference is more like a super-cabinet of all the Australian parliaments, discussing administrative matters which ought at least to be argued in private—for example, determining on a compulsory reduction of interest rates to meet a financial emergency (conference of 1931). Its earlier achievements were small; the states did not agree easily, and their parliaments frequently refused to carry out what the premiers agreed. But, since 1931, the Premiers' Conference has acquired greater importance. In that year, the conference produced the 'Premiers' Plan' for dealing with the depression; whether right or wrong, the plan was of fundamental importance to the Australian economy. The conferences of the second world war played an important part in the defence of Australia. Decisions are now arrived at more easily, and observed more faithfully—probably because the federal government, which takes the lead, can back the decisions with its financial strength. However, decisions requiring legislation are still ineffective unless translated into seven acts of parliament, which may not be achieved. In 1944, an expanded Premiers' Conference—containing opposition leaders as well as Ministers—agreed to a temporary extension of Commonwealth powers by state legislation. The agreement was ineffective, because four state parliaments[2] refused to legislate as required.

Other federal-state conferences take place at irregular intervals between administrative officers of the several governments; for

[1] Since this was written, the limited authority of the Premiers' Conference has again been demonstrated; Queensland and Western Australia have refused to ratify the rail-gauge scheme.

[2] Victoria, South Australia, Western Australia and Tasmania.

example, Public Service Commissioners and police chiefs. Indeed, conferences of experts are coming to be an accessory feature of Premiers' Conferences themselves ; the Premiers decide a principle, set their experts to fight out details, and then adopt the result.

In 1928, another important instrument of co-operation was created, this time legally and officially by an amendment to the federal constitution and by legislation of the seven parliaments. This is the Loan Council, which controls the raising of loans, other than war loans, for all the Australian governments, and the allocation of the proceeds between the federation and the states. The Loan Council consists of a representative from the federal government (with two votes and a casting vote) and each of the state governments (with one vote each). Usually the Prime Minister and the Premiers are the designated representatives, and meetings are usually held concurrently with Premiers' Conferences. The Loan Council works under the terms of a constitutional contract operating until 1986, by which the federal government becomes the sole borrowing agent for Australian governments, assumes responsibility for all existing state debts, and agrees to contribute specified proportions of state interest burdens. Loan Council decisions on most matters of importance have to be unanimous, but the financial agreement itself provides for allocation of loan moneys in the event of disagreement. This unique arrangement cuts across both parliamentary and federal principles, since it places control of an important feature of public finance in the hands of an extra-parliamentary body, and limits the financial autonomy of all the parties to the federal compact.

5. *The Queen*

The Queen is represented in Australia by a Governor-General and six Governors. The Governor-General is appointed by the Queen on the advice of the federal Prime Minister. Under an Imperial Conference decision of 1926, he represents the Queen directly—not the British government—and occupies the same position in relation to the federal parliament as the Queen does in relation to the parliament at Westminster. His legal powers are similar to the Queen's, the most important being the summoning and dissolving of the federal parliament, the control of the federal executive and the command of the Commonwealth's armed forces. As in the case of the Queen, his powers are controlled by convention. He acts on the advice of ministers. As in the case of the Queen, he need not be a cypher, and has 'the right to be consulted, the right to encourage, the right to warn'. But in the nature of things, a Governor-General holding office for a limited period is not likely to acquire the familiarity with

Australian problems and political leaders which kings such as Edward VII and George V acquired in the British sphere.

The position of the state Governors cannot be described so clearly, since the Imperial Conference declaration of 1926 does not apply to them. They are still formally appointed by the Queen on the advice of her Secretary of State for Commonwealth Relations, and they still in form represent the British government as well as the Queen personally. But in practice, the state premiers are closely consulted by the British government, and the British government no longer presumes to control the Governors. These Governors have a long history going back to days when they possessed real power ; it is still a disputed question whether convention has placed them in exactly the same position as the Governor-General, or whether they still have some greater degree of discretion. In 1932, the Governor of New South Wales dismissed a ministry which had a parliamentary majority, against the advice of that ministry, because he considered—(against the advice of the Attorney General)—that it was acting illegally. The rights and wrongs of his action, and indeed the whole question of the 'Governor's discretion', have become the subject of much polemical literature.[1] It is sufficient here to say that in normal times the state Governors act on the advice of their ministers just like the Governor-General, and if in time of crisis they reject the advice of ministers, the wisdom of their action is ultimately judged by the electors.

The title 'Governor-General' suggests, misleadingly, that there is some official hierarchical relation between him and the Governors. In fact, the title is important only for establishing precedence at dignified functions. Otherwise, there is no official relationship between the Governor-General and Governors, or between the Governors. Until 1931, the Governors-General had been titled Englishmen with a distinguished record of empire service, but in that year a federal Labor Party government secured the appointment of a distinguished Australian, Sir Isaac Isaacs—one of the Federal Fathers, and third Chief Justice of the High Court of Australia. The regime of eminent English appointees was then resumed, culminating in the appointment in 1943 of King George VI's brother, His Royal Highness the Duke of Gloucester, on the advice of another Labour Government. But in 1946, yet another Labour Government secured the appointment of Mr. W. J. McKell, an Australian who at the time of his appointment was Labour Premier of New South Wales. Both the appointments of Australians were widely criticised, but between 1930 and 1946 the ground of the criticism changed significantly,

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[1] See Evatt, *The King and his Dominion Governors*, O.U.P., 1936.

Mr. Scullin, who as Prime Minister advised the Isaacs appointment, has observed that the only sin of Sir Isaac was being an Australian. The critics of the McKell appointment disclaimed any objection to His Excellency on that score, and rested their criticism on his recent active association with party politics. Since the Governor-General and the Governors have to perform, on infrequent but sometimes critical occasions, duties of a semi-judicial character, there is much to be said for the view that Australian appointees should be persons with no strong political attachments. In 1946, Labour governments in New South Wales and Queensland secured the appointment of the first Australian state Governors; they were both distinguished soldiers with no political affiliations. This question seems therefore to have settled into party lines; Labour governments are likely henceforth to secure the appointment of Australians,[1] whereas non-Labour parties are likely to continue the tradition of English appointees. Imported governors are favoured by some Australians on the ground that they provide a real link with Britain, are more likely to be completely impartial and—(this less publicly)—that they provide a touch of English polite society. They are opposed by other Australians on the grounds that they cannot be well acquainted with Australian institutions, problems and political personalities, that their impartiality may be more like indifference,[2] and—(again less publicly)—that their presence is conducive to social snobbery.

During temporary vacancies in the office of Governor-General and Governor, their duties are performed by deputies, variously called Lieutenant-Governors or Administrators, who are usually eminent Australian judges or elder statesmen. In the case of the states, some of these deputy Governors have carried on for long periods and have had to deal with important constitutional questions. An Australian deputy Governor of Queensland facilitated the abolition of the Queensland Legislative Council in 1922 by nominating sufficient Labour supporters to that body to pass the Abolition Act —a course of action for which King George V had supplied precedent in his dealings with the House of Lords. The functions of Governor of Western Australia were discharged for seven years by the Australian Lieutenant-Governor, Sir James Mitchell,

[1] Though since 1945, the Tasmanian Labour government has secured the appointment of three English governors.

[2] Alternatively it is sometimes suggested that English Governors lean to the right. In fact, they have usually maintained a scrupulous impartiality. In 1932, the English Governor of New South Wales, in a very difficult situation, leaned somewhat to the right, but in 1865 and 1878, English Governors of Victoria leaned somewhat to the left; they supported a radical lower house against a tory upper house in a protracted dispute over the introduction of protective tariffs.

before his appointment as Governor in 1948; hence in actual practice though not in legal form, Sir James might be regarded as the first Australian governor of a state. In another respect, Sir James was a forerunner of Mr. McKell since Sir James also was appointed by a Labour government, and immediately before that had been Premier of Western Australia: however, the analogy breaks down on an important point, since Sir James had been leader of the chief *non-Labour* party.

6. *The Parliaments*

The Australian constitutional system is said to embody the principle of 'parliamentary sovereignty', as distinct from the principle of 'people's sovereignty' which is the basis of the U.S. Constitution. The highest judicial authorities have frequently described the seven Australian parliaments as 'sovereign within their powers', or as possessing 'plenary authority'. These propositions are confusing to British students, since in Britain 'parliamentary sovereignty' means that anything which the Parliament enacts must be treated by the courts as law. No Australian parliament is sovereign in that sense. The state parliaments might have acquired such a status, as the parliament of South Africa has done, if there had been no federation; the disappearance of British control of the self-governing colonies, formally declared by the Statute of Westminster 1931, would then have removed the few restrictions on the competence of the state parliaments contained in the original state Constitution Acts. But the federal Constitution Act expressly makes the federal parliament a body with strictly defined powers, and expressly limits in many ways the competence of the state parliaments. The power of the Australian courts to police the distribution of power and the restrictions on power necessitated by federalism are quite inconsistent with parliamentary sovereignty in the British sense. Nevertheless, the apparently self-contradictory proposition that the Australian parliaments are 'sovereign within their powers' does connote some important facts. It means that the Courts do not regard the parliaments as *agents*, either of the British parliament or of the Australian electors. Hence Australian parliaments can delegate their authority in ways not permitted to U.S. legislatures. Hence also the principle of the electoral mandate, so actively discussed during the campaign against the Chifley government's decision to nationalise the trading banks in 1947, has no constitutional basis; it is a maxim of political expediency, which political parties never expressly repudiate, but which they easily evade by referring to the permanent party platform, or by citing vague and general proposals in their election speeches,

or by claiming they were elected on a 'blank cheque'. As the constitutions stand, Australian electors decide who shall make the laws, not what the laws shall be. The provision for constitutional referendums made in the federal, Queensland and New South Wales constitutions does bring Australia closer than Great Britain to a principle of 'people's sovereignty', but these provisions relate to questions of constitutional structure and parliamentary power to make laws—not to questions of the detailed content of particular laws within the existing competence of the relevant parliament.[1] Hence if Australians would like the people to have a more direct supervision of parliamentary legislation than is provided by the vague and slippery political theory of the 'elector's mandate', it will be necessary to amend the constitutions so as to provide for initiative, referendum and recall as ordinary parts of the legislative process, on Swiss and Californian models. There are strong arguments against recall of elected persons before their term is up, and also against initiation of legislation by petition of electors. But there is much to be said for submission of all legislation to referendum if a substantial number of electors and members of parliament require. The difficulty and expense of holding such referenda, even on a federal scale, would be greatly reduced if the nation would devote to the problem half the inventiveness and capital it has put into the mechanisation of horse-racing, dog-racing and the betting thereon.

The proposition that Australian parliaments are in some sense sovereign also affects the judicial attitude to statutes of those parliaments. It has been said that the courts treat Acts of Parliament with comparative respect, as compared with the comparative disrespect they display for the regulations and by-laws of subordinate law making authorities such as municipal councils. The difference in attitude is one of degree, and the attitude to regulations and by-laws has in recent years been growing steadily more 'respectful', but a difference still exists. The courts feel bound to attribute a meaning to an Act of Parliament, however unintelligibly it is drafted; they will if possible give it a meaning which ensures its constitutional validity; in interpreting the grant of power under which the statute was passed, they will give the power a wide rather than a narrow meaning; and if part of a statute nevertheless must be held beyond power, they will if possible 'sever' any parts of the statute which are within power rather than treat the statute as wholly invalid. In theory, the courts

[1] However, the 1951 referendum proposals mentioned on page 6, footnote no. 1, asked not only for power to deal with communism in general terms, but also for specific validation of the Communist Party Dissolution Act previously held invalid by the High Court. Some political observers consider that if the referendum had been confined to the specific Act, it would have passed.

of the U.S.A. follow the same principles, but the Australian dogma of 'parliamentary sovereignty' gives these principles added strength.

Queensland has a parliament of one chamber.[1] The other five state parliaments and the federal parliament have two chambers. In general plan, procedure and privileges, these parliaments follow the model of the British House of Commons. The Speakers in the lower houses, the Presidents in the upper houses, and the Chairmen of Committees occupy in principle a quasi-judicial position above the battle, as in Great Britain ; there is no principle of majority leadership or seniority as in U.S. legislatures. The upper house Presidents often occupy their positions for many years, but the Speakers of the lower houses do so only if they establish an exceptional personal prestige or if the party in power has a narrow majority and prefers not to lose a vote by ousting a Speaker from the other side ; otherwise, Speakers change as majorities change.

Three English writers spanning a half century—Bagehot, Low and Muir—have described how cabinets have come to dominate parliaments, and how the civil service has come to dominate cabinets. The analysis is fairly applicable to Australia, though probably Australian parliaments have retained a somewhat higher degree of initiative than the parliament at Westminister ; that is because Australian electoral systems make for narrow party majorities, and because Australian parliaments are often divided between three parties in such a way that corner parties and independents have a balance of power. Nevertheless, Australian cabinets, through their party majority, usually have adequate control at least of the lower houses, and the overwhelming bulk of parliamentary time is taken up with the cabinet's legislative programme and the budget.

Memberships of the Australian Parliaments

—	Federal	N.S.W.	Vic.	Q'land	S.A.	W.A.	Tas.	Totals
Upper Houses	60	60	34	nil	20	30	19	223
Lower Houses	122	94	66	75	39	50	30	476
Totals	182	154	100	75	59	80	49	699

Australians frequently complain that they are over-governed. Certainly, 699 members for nine-million-odd people, or one member per twelve thousand of the population, seems generous compared with England's 630 Commons members for a population about six times as large, or one per 80,000 ; there is still a considerable disparity

[1] For convenience, it is included throughout this book in the expression 'Lower House'.

if one counts in the hundred or so members of the British House of Lords who regularly attend parliament, and even if all the seven-hundred-odd peers are included, the British quota of legislators would still be less than one per 35,000 of the population. The forty-nine legislatures of the U.S.A. contain between them about 8,000[1] members, or one member per 20,000 of the population, which still makes the Australian allowance seem generous. On the other hand, the Australian figures are very moderate if compared with those of some American states; New Hampshire, with a population of about 500,000—less than that of Western Australia—has a legislature with a minimum membership of 399, or one representative per 1,250 of the population.

But at the same time as they complain of over-government, Australians also frequently complain that their representatives in each parliament are too few to provide either adequate representation or a sufficiently wide choice of personnel for the cabinets. On British standards, the electorates are not over-large in voter content—in 1951 federal lower house electorates ran to a maximum in the fifty thousands,[2] and state lower house electorates in the thirty thousands. But Australia is nearly as large as the U.S.A., and thirty-three times the size of Great Britain. Electorates run to corresponding areas; thus the federal electorate of Kalgoorlie in Western Australia had in 1951 an area of nearly 900,000 square miles—ten times the size of Great Britain, and the larger the electorate, the poorer the communications. This consideration to some extent invalidates the British comparison on representation per head of the population. The U.S.A. comparison is to some extent invalidated by another consideration—choice of cabinets from the parliaments. In the U.S.A., the President and the state governors are *prohibited* from including legislators in their cabinets whereas in Australia the Governor-General and Governors are *compelled* to obtain their cabinets from the parliaments. If the forty-nine U.S. executives are added to the total of legislators, the U.S. supply of politicians in office per head of population is about the same as in Australia. Australian Prime Ministers and Premiers have often had cause to envy U.S. senior executives their wide field of choice for ministers.

Although the choice of cabinet personnel presents the greatest difficulties, Australian parliaments also suffer in other branches of their work, such as the provision of reasonably competent standing

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[1] In two states, the number varies with the population.

[2] Under the amendments of 1948, providing for re-distribution and more members, federal electorates were reduced from an average exceeding 60,000 to an average in 1951 of 45,000 voters for all states except Tasmania.

or special committees on various technical problems ; for example, the control of delegated legislation. The defect was felt most in the case of the federal parliament—as was the representation difficulty—and in 1948 the number of members was increased by 69. But the difficulty is also felt in the state parliaments, with the possible exception of New South Wales. The relative degree of progress of the states in matters not of great political importance—for example, consolidation of statutes—has been due largely to accidents of personality among the legislators, since there is no continuous supply of men from the top of every trade and profession, as is the case in the British parliament. It is often said, in Australia as elsewhere, that there are too many lawyers in parliament, yet it has sometimes happened in Australian state parliaments that the party in power could not supply a lawyer to fill the office of Attorney-General. It is evident that the contradiction 'We have too many politicians—we need a wider choice of personnel in parliament' is one of the inevitable contradictions of federalism. It is due to the fact that our legislators are scattered between seven parliaments, and have to provide seven cabinets and seven sets of parliamentary committees. If Australians want to retain their federal system, they will probably have to resign themselves to paying for more legislators, not less.

All Australian members of parliament receive annual salaries. Lowest paid are New South Wales upper house members, at £300 per annum; highest paid are federal members of both houses at £2,350 per annum.[1] The state average is about £1,500 per annum. In Tasmania, salaries vary in accordance with the difficulty and distance of communications between the electorate and Hobart, the state capital. Queensland state members also receive 'mileage and passage money'. In Victoria and Western Australia, salaries are adjusted in accordance with the cost of living. The general trend in the past twenty years has been upward, with a slight setback during the great depression. State salaries are still clearly very inadequate either for the work performed or as an inducement for able men. Even the federal salary is not over-generous, since most Federal members have to live an expensive life in Canberra hotels, or obtain a still more expensive home there, in addition to maintaining a home in their own state ; however they now have free air as well as train travel. Various schemes for pensioning members, or insuring them against loss of seats, have been proposed and

[1] Federal members also receive expense allowances varying with the area and remoteness of their constituencies, and may employ a secretary at Commonwealth expense.

are likely to be increasingly adopted. In Western Australia, the state and members contribute to a fund from which members who lose their seats are paid compensation in a lump sum up to £600. In New South Wales, Victoria, Queensland and South Australia, lower house members are entitled to life pensions if they are defeated or resign after certain periods of service, and similar rights are enjoyed by the members of both federal houses; these schemes are likewise contributory.

The federal lower house is called the House of Representatives; Queensland's single house, and the lower houses of New South Wales, Victoria and South Australia are called Legislative Assemblies, while the lower houses in Tasmania and South Australia are called Houses of Assembly. The Tasmanian lower house has a maximum duration of five years, the others of three years; all are subject to earlier dissolution. The Governor-General and Governors have the legal power of dissolution, which they exercise normally only on the advice of the Prime Minister or Premier; whether in exceptional circumstances the governor could act without or against such advice is, as indicated above, still the subject of dispute. The lower houses are the popular houses *par excellence*, elected by Australian residents of both sexes over 21 who are British nationals[1] by birth or naturalisation, but excluding in the case of the federal, Queensland and West Australian franchises British nationals of Australian aboriginal, African, Asiatic or Pacific Island race, other than British Indians.[2] Qualifications for membership of the lower houses are the same as qualifications for the franchise, plus a longer period of residence in Australia for naturalised persons. The position of the upper houses requires special treatment.

7. *The Upper Houses—Federal, New South Wales and Victoria*

The federal upper house is called the Senate, and was intended by the founders to be an embodiment of the federal principle. It consists of ten Senators from each state, elected directly by the people of the states qualified to vote for the federal lower house. Qualification for membership is the same as for voting. This house was intended to protect the states generally, and in particular to protect the

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[1] As a matter of law, there is no separate Australian 'nationality', as there is separate Canadian, South African and Indian nationality, but there is separate Australian 'citizenship'.

[2] Queensland admits Syrians of British nationality and Western Australia Maoris, to vote, and 'natives' naturalised *in Australia* are also admitted; the Commonwealth also admits returned servicemen not otherwise eligible, and Australian aboriginals who have the vote for the lower state house where they reside.

less populous states from any unfair use of the majority representation which the more populous states have in the lower house. The working of party politics has largely defeated this object. Senators have come to be members of one of the great parties first, and state representatives second ; in fact, they represent their states no more and no less than do the representatives from various states in the lower house. When feeling between the federation and a state is tense, as in 1934 when Western Australia attempted to secede from the federation, then *all* the state representatives in the federal parliament reflect that feeling. The normal relation between the states and the federal authorities varies from uneasy truce to amicable co-operation, and in such circumstances the activities of Senators follow ordinary party lines. The Senate has no special control over the administration or over foreign affairs,[1] so it has not been able to develop the dignity and prestige of the U.S. Senate. Its justification is now that of any second chamber ; it has usually more time to peruse legislation and delegated legislation than the lower house, is some safeguard against over-hasty action by the lower house, and because of its duration has greater continuity and stability of personnel than the lower house. Senators hold office for six years, five Senators from each state retiring every three years. The Senate cannot be dissolved excepting in the case of a deadlock between the houses. The duration provisions make such deadlocks possible, since at any time half the Senate represents the opinion of the electors at a period earlier —(usually about three years earlier)—than the last general election for the lower house.

The upper house in the New South Wales and Victorian parliaments is called the Legislative Council ; in N.S.W. it consists of sixty members elected by the members for the time being of the two houses—the only example of indirect representation in Australia. Members hold office for twelve years, fifteen retiring every three years. The qualification for membership is the same as for the lower house, plus three years residence in Australia. This system was introduced in 1934 ; prior to then, the upper house was nominee. Thus the first 'reformed' council was elected by a body of elected members of the Legislative Assembly and a body of nominees owing their original appointments to many different political circumstances. In the course of time, the Legislative Council has become more truly representative in character—the last batch of members reflecting directly the view of the former nominees having retired in 1946. However, in an even

[1] The treaty making power of the Commonwealth, and the power to declare war and peace, are vested in the Governor-General and exercised on the advice of Cabinet, but a treaty cannot by its own force change Australian law.

greater degree than the federal Senate, this Council must represent an earlier electoral opinion than that represented in the lower house, with a consequent possibility of deadlocks. But like the federal Senate and unlike the other state upper houses, this Council has no political function other than that of a revising chamber, with greater continuity of personnel and greater party stability than that possessed by the lower house. It cannot be dissolved. In 1950, Victoria, which till then had an upper house based on a special franchise, adopted universal suffrage for upper house elections, but retaining the old electorates. Members are directly elected for six years, half the house (seventeen members) retiring every three years.

8. *The Upper Houses—South Australia, Western Australia and Tasmania*

These upper houses are called Legislative Councils, but are elected by the people on a narrower franchise than that which qualifies lower house voters. The members must be at least thirty years old, and in Tasmania must possess one of the qualifications required of upper house voters, but in Western Australia and South Australia, curiously enough, members require only British nationality and state residence qualifications similar to those in all the franchise provisions. Hence in Western Australia and South Australia, a person can be an upper house member although he has no vote for the house.

The basic qualification for voters—other than the usual British nationality and state residence requirements—is the ownership, leasing or occupation of land of a specified capital or annual value. This represents the principle widely accepted in Britain and Australia during the nineteenth century, and formerly expressed in lower as well as upper house franchises, that the 'man with a stake in the country' should have a special political position. The principle is now expressed in its purest form in Western Australia, whose upper house franchise is solely based on land ownership or occupation. South Australia's upper house was originally in the same case, but an alternative qualification has been added; namely being an honourably discharged member of His Majesty's armed forces who has served in an overseas war theatre. Tasmania also has the discharged serviceman franchise as an alternative to the usual landowning or occupation provisions, but Tasmania has as further alternatives certain professional qualifications: being a lawyer, doctor, university graduate, parson or officer—serving or discharged—in the armed forces.

These voting qualifications are expressed in language of technical difficulty, varying from state to state, and the land values required

under the property qualifications also vary considerably, so that the inquiring citizen needs to go into the matter with the State electoral authorities before he knows just where he stands. The long term tendency has been to reduce the statutory land valuations required, and this liberalising tendency has been assisted by the steady depreciation which the Australian currency—in common with most other currencies—has experienced during the last fifty years. In South Australia, the tenant occupier of *any* dwelling house, and in Tasmania the owner of *any* freehold and the occupier of *any property* now qualifies. Hence the practical effect of the property qualifications is more and more to embody a principle not specifically set out in any of the constitutions, namely 'head of the family' franchise, excluding other members of the family and lodgers—since the head of the family (not necessarily the husband !) is usually the legal 'tenant' or 'occupier' of the home. If returned servicemen enrol in large numbers for the South Australia and Tasmanian upper house vote, the political character of those houses may change rapidly ; the South Australian provisions probably include even members of the conscript militia who served outside Australia, but on this point the Tasmanian provision is ambiguous. If the Returned Soldiers, Sailors and Airmen's Imperial League of Australia ever decided to go in for politics, it should with a little organisation be able to swamp these two upper houses.

The restrictive effect of these franchise provisions is shown by the following table, taken from different years in the case of each state.

Voters for Upper and Lower Houses

State	Year	Voters Enrolled	
		for Lower House	for Upper House
South Australia	1941	378,265	115,952
Western Australia ..	1940	265,987	86,343
Tasmania	1945	140,000	45,000

An examination of earlier figures shows that for many years the proportion of upper house to lower house voters has in each state been about one to three or four.

The South Australian and Victorian upper houses can be dissolved by the Governor under deadlock provisions ; otherwise all the houses under consideration are indissoluble. Membership is 'staggered' as in the New South Wales and the federal upper houses. In South Australia, the minimum membership term is six years ; not more than two members from each electoral district, having served six years, retire at each general election for the lower house, so that if lower house elections took place every three years, ten upper house members—

(half the house)—would retire every three years. Since lower house elections can take place at any time within the three-year maximum duration of that house, the practical effect of this provision is more complicated ; nevertheless, the scheme secures the economy of always having lower and upper house elections at the same time, and it ensures that some part of the upper house will have been elected on the issues which led to the choice of the lower house for the time being. In Western Australia, membership is for six years, ten members—(one third of the house)—retiring every two years. In Tasmania, membership is also for six years, but at least three of the nineteen members retire *every year*—a scheme as extravagant as that of South Australia is economical.

These upper houses can and do discharge the proper functions of revising chambers, and because of their 'staggered' membership have greater continuity of personnel and can take a longer view than the lower houses. Most state upper house members pursue a convention that bills passed by lower house majorities, of whatever party, should not as a rule be rejected outright in the upper house, but should only be amended in detail or at the most delayed.[1] This convention may be growing weaker as a result of party discipline extending to upper house members, though probably retention of the convention is a condition of the survival of the special franchise. However, the consistently anti-Labour majorities of these houses and their character as representatives of privileged sections are much in the public eye. The citizenry accordingly tend either to support them as bulwarks against Socialism, or to curse them as 'Houses of Doddery'. The Labor Party is pledged to their abolition. The other Parties, valuing them for the party advantages they afford, offer no constructive proposals for reform which would make these houses more representative, while retaining the virtues of a chamber of review.[2]

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[1] In 1947, the anti-Labor majority in the Victorian upper house, then elected on a restricted franchise, refused supply to a Labor government with a lower house majority, in order to force an election ; the purpose was to produce an electoral demonstration against the *federal* Labor government's attempt to nationalise the private banks. The electorate took the opportunity of doing so, and the state Labor government was heavily defeated. However, it was a dubious use of upper house powers, and political moralists may see the hand of fate in the subsequent history of bitter internecine feuds in the Liberal-Country Party coalition which succeeded Labor, the break up of the coalition and the accession to power of a Country Party government, supported by the Labor Party, which reformed the upper house franchise as mentioned above.

[2] This opinion is left unchanged from the first edition. The reform of the upper house franchise in Victoria in 1950 was carried out under Labor Party pressure as a step towards abolition.

9. *Deadlocks*

Deadlocks between the houses can and do occur in each of the six parliaments with upper houses. In the federal and New South Wales parliaments, they can occur either way—radical lower house *versus* conservative upper house or *vice versa*. In the other states, the disputes have all been one way—radical lower house *versus* conservative upper house. Sometimes these disputes are settled by a more or less amicable compromise; sometimes they impose a severe strain on the machinery of government, as in Victoria in 1865 when a deadlock led to civil servants and other government creditors remaining unpaid. Most of the difficulties in which Governors or Acting Governors have been involved have been caused by such disputes. The pressure of public opinion, the fear of disrupting law and order, and common sense always restrain the disputants; these are still the only restraining factors in Western Australia and Tasmania, whose constitutions provide no formal machinery for overcoming deadlocks.

The federal constitution provides that in the event of a deadlock, the Governor-General may dissolve both houses; if after the resulting general election, the deadlock persists, the Governor-General may convene a joint sitting of both houses, and if the bill in dispute is passed by an absolute majority of the membership of both houses, it will become law. Most commentators consider that the Governor-General is now, pursuant to convention, obliged to exercise these powers if so advised by his Prime Minister, and he has so acted on the two occasions (1913 and 1951) when double dissolutions have been obtained. On each occasion, a government has been returned with control of both houses, so that no joint sitting was necessary. Victoria has a closely similar provision, but instead of a simultaneous double dissolution, the lower house is dissolved first; if the deadlock persists after the ensuing election, then the upper house is dissolved, with the final decision left to a joint sitting.[1] The effect of the joint sitting provisions in the federal and Victorian constitutions is that a sufficiently determined electoral opinion expressed in the lower house will eventually prevail, at any rate while, as at present, the lower houses have about twice the membership of the upper houses.

In New South Wales, as under the British Parliament Act of 1911, the upper house has only a limited power with respect to money bills —(that is, taxation and appropriation bills); the upper house can delay such bills for a month, but after that they can become law without the upper house's assent. On other bills, a persistent deadlock

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[1] The provision does not apply to bills for abolishing the upper house or for amending the deadlock machinery.

is decided by the holding of a referendum of those qualified to vote for the lower house. This seems the most sensible and expeditious method of any Australian constitution, and probably the cheapest as well.

In South Australia, a deadlock is followed in the first instance by the dissolution of the lower house. If it persists after a new house is elected, then the Governor is given a choice ; he can either grant a double dissolution, or he can issue writs for the election of ten additional upper house members—two from each electoral district. No subsequent step—such as a joint sitting—is provided. This again raises the problem of constitutional convention—is the Governor bound to follow the advice of his Premier in deciding which step should be taken ?

The above paragraphs give the substance of the deadlock provisions, but it should be noted that there are many more details not set out ; for example, provisions fixing the minimum time between each step to ensure that every effort is made to achieve amicable settlement. The New South Wales, Victorian and South Australian provisions had never been used up to 1956, but that does not mean the provisions are useless. Their existence has doubtless influenced members of both houses in each of these states when negotiating a settlement of inter-house disputes.

10. *Electorates*

First, the lower house electorates. All seven Australian electoral laws enforce strictly in lower house elections the principle of one man one vote. But complete electoral equality between citizens requires also that the number of voters in each electorate be approximately the same. This principle is achieved by the lower house election laws of the federal, Victorian and Tasmanian parliaments. The federal constitution requires that the federal electorates be based on equal quotas, with a small variation to meet administrative convenience ; one exception is made, however, by requiring that no state should have less than five representatives, so that Tasmania, which would not have five federal members if its electorates contained the mainland quota, still has five members[1] and a smaller quota. However, even the Tasmanian quota is little smaller than the minimum downward deviation from the quota permitted on the mainland, so that the federal lower house is fairly representative of the Australian people. Tasmania sensibly and economically uses the federal lower house constituencies

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[1] The representation of the other states in the federal lower house is as follows : N.S.W. 47, Vic. 33, Q. 18, S.A. 10 and W.A. 8.

as its state lower house electorates. In 1953, Victoria followed suit by creating *two* State electorates out of each federal electorate.

The states of New South Wales, Queensland, South Australia and Western Australia are divided for electoral purposes into regions; within a region, the electorates contain approximately equal numbers of voters, but the quotas for the different regions are unequal, the general purpose being to give voters outside the capital cities more representatives, proportionately to numbers, than are given to the city dwellers. In New South Wales, the Sydney area has forty-eight members, the rest of the state forty-six. In the election of 1950, city electorates averaged 23,000 voters, country electorates 17,000.[1] Queensland has four areas, the Metropolitan with twenty-four members, the South-East with twenty-eight, the North with thirteen and the West with ten. In 1950, Metropolitan electorates averaged 11,000 voters each, South-Eastern 9,500, Northern 8,000 and Western 4,500.[2] South Australia has two areas; the metropolitan with 60 per cent of the population, is represented by thirteen members from constituencies averaging in 1956 over 22,000 voters each, and the country is represented by twenty-six members from constituencies averaging under 7,000 voters each in the same year. Western Australia has three areas, the Metropolitan, the Agricultural-Pastoral-Mining, and the North-West. The last sparsely settled area is arbitrarily divided into three seats of under 1,000 voters, commonly known as the 'pocket boroughs'. Forty-seven seats are divided between the other two areas in such a way that a Metropolitan elector's vote is worth half the value of a country elector's vote.[3]

This practice of giving the metropolitan area less parliamentary strength per voter than farmers and country townsmen began when landowners dominated politics and feared the radical city masses;

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[1] Before 1950, the state was divided into three areas—Sydney, Newcastle and the rest. The present scheme has reduced the size of Newcastle constituencies, which tend to be pro-Labor. However, it was a reform in the right direction, since it has greatly reduced the range of disparity between electorates.

[2] This scheme, introduced in 1949, replaced an earlier principle of approximately equal electorates for the whole state. The Labor Party has a considerable advantage in the pastoral areas of the west and the sugar areas of the north, and this grossly unequal distribution of voters (together with first-past-the-post voting, to be dealt with later) led to the return in 1950 of a Labour government in a minority of more than 10,000 in the state as a whole. The Labour government which introduced this scheme had itself been elected on a minority vote in 1947.

[3] This system favours the anti-Labor parties. It replaces a system which favoured the Labor Party by grossly over-representing (as now in Queensland) the outback areas dominated by the Australian Workers Union. It seems a pity that the states cannot settle down to permanent equality of electorates, as in the federal sphere, instead of oscillating between different forms of gerrymandering.

its effect has been aggravated by the rapid growth of the cities, in which about half of Australia's population lives. It has been retained partly because of a genuine feeling—not confined to the country, though of course strongest there—that the farmer is the backbone of the country and has suffered from the policy of tariff protection which has contributed to the growth of the cities. But in the general chaos of world markets, the 'tariff hardship' argument is becoming less valid, and the metropolitan markets are becoming more and more important to the farmer. Less worthy reasons also contribute to the retention of electoral inequality, such as the vested interests of political parties which owe their power to this arrangement, and theories about the superior morality of the man on the land. Probably the only completely valid argument for smaller electorates in some—not all—country areas is difficulty of communications, but in this age there seems no good reason why the candidate and the ballot box in such cases should not be taken to the elector rather than vice versa. The long term trend is to reduce the disparity between city and country electorates. The trend is helped by the fact that the larger number of voters in city electorates penalises not only the Labor Party—though, except in Queensland, it is the chief sufferer—but also parties based on the metropolitan manufacturing, commercial and professional classes.[1]

Secondly, the upper house electorates. The federal upper house, because of its constitutional function, takes each of the six states as an electorate. Thus in 1951 New South Wales's 1,941,000 electors were represented by ten Senators, and so were the 163,000 electors of Tasmania. There has not been any great public feeling about this example of individual voter inequality, since no major party is entrenched in any one state. Political swings in the federal sphere have usually been Australia wide. In the upper house electorates of Victoria, South Australia, Western Australia and Tasmania, there are inequalities of voter-strength somewhat similar to those of lower house electorates. The disparity in Western Australia reaches ludicrous extremes; in 1938, one upper house district had only 866 voters, while another had 31,024. The differences again favour the country as against the city voter. Probably more equal distribution of voters in these electorates would make the upper house less markedly conservative, but those with an itch to reform regard the distribution anomaly as so small compared with the franchise question that the former is rarely mentioned in public discussion.

All the lower houses have single member constituencies, except

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[1] The Labor Party is usually strong in outback areas of a predominantly pastoral or mining character.

the Tasmanian, which has five districts each returning six members. The federal upper house takes ten members from the whole of each state. Victoria's upper house has seventeen two-member constituencies, South Australia's has five four-member constituencies, Western Australia's has ten three-member constituencies. Tasmania has nineteen single-member constituencies.

11. *Elections*

The voting system generally used in Australia is the simple preferential or 'alternative vote'. Voters indicate their preferences by putting 1, 2, 3, etc. opposite the candidates' names. Except in Queensland, an exhaustive indication of preferences is necessary to a valid vote; Queensland's former state electoral law required only the first preference to be expressed, and made the expression of subsequent preferences optional. A candidate obtaining an absolute majority of first preferences is elected; if none does so the candidate with the fewest first preferences is eliminated, and the second preferences on the relevant papers distributed as if first preferences among the other candidates, and so on until a stage is reached at which some candidate has an absolute majority—one half plus one—of the valid votes cast. Before 1942, Queensland had a further variant of this system; if no candidate obtained an absolute majority on first preferences, then *all* the candidates *except the two highest on first preferences* were eliminated and their preferences distributed. Hence one of the two highest on the first preference count was necessarily elected. But in 1942, a Queensland Labour majority introduced the crude first-past-the-post system used in British and most American elections.[1]

These preference systems work reasonably well for single-member constituencies. They avoid the possibility, inherent in the 'first-past-the-post' system, of a candidate in a three (or more) cornered contest gaining a seat, although a majority of the electors are against him, and the further possibility of a party supported by a minority of the electors obtaining a majority in parliament. It is to be observed that in Victoria—(except in the rare case of 'deadlock dissolutions')—and Western Australia, the staggered system of retirement for upper house members means that even the multi-member upper house constituencies elect only one member at a time. But the system appears to work unfairly where a constituency elects

[1] In the 1947 Queensland election, this produced a minority government. The Labor Party polled about 233,000 votes and won 36 seats, while non-Labor candidates polled about 302,000 votes and won only 26 seats. Since then, as mentioned earlier, unequal distribution of electors has accentuated the tendency to minority government.

two or more members at a time. In such cases, after one member has been counted in as described above, the whole of the votes are re-counted, starting with the second preferences of the ballots which placed the already elected member first. The practical result of this is that if voters keep fairly closely to a party ticket, *all* the members elected will be of the same party. This result has been particularly noticeable in the case of the federal upper house ; with constituencies the size of a whole state, it can be seen to be anomalous that a party having a small plurality of the total vote in a state should obtain all the seats at the triennial elections, or in other words that such large minorities of voters should remain unrepresented. Hence in 1948, proportional representation, shortly to be described, was adopted for the Senate.

In truth, however, a careful examination of the single-member constituency position under the above systems discloses a similar unfairness ; the multi-member constituency case merely makes the unfairness obvious. In the case of single-member constituencies, the unrepresented minority is spread over many constituencies. By obtaining narrow majorities in many electorates, a party will obtain a parliamentary majority out of proportion to its gross electoral majority.

This is avoided by proportional representation on the Hare system of a single transferable vote, which is used for Tasmanian popular elections to the lower house, the federal Senate and New South Wales joint house elections to the upper house. Under this system, multi-member constituencies are required—Tasmania has six members per electorate—and the voter again expresses preferences—Tasmanian law requires three to be expressed, further ones being optional. The counting system is intricate and requires to be studied in a special work on the subject.[1] Its principles, however, are simple. A candidate has to obtain a certain quota of votes. But not only may he be helped to that quota by the preferences of those below him—as in the simple preferential system ; in addition, any *surplus* of votes he obtains over that quota is distributed among other candidates in accordance with the preference expressed by voters. This system has been criticised on the ground that since it gives some representation to each reasonably large party, it encourages proliferation and fragmentation of parties, produces shifting combinations of parties and bargaining for the support of 'corner groups', and so tends to unstable and even corrupt government. Tasmanian experience before 1940 did not justify these criticisms; the state preserved a substantially

[1] With modern calculating machines, intricacies of counting methods offer no practical difficulties.

two-party system, and one party or the other usually had a reasonably secure working majority. The mainland states with simple preferential systems frequently have three major parties and a number of independents, with resulting bargaining and instability. On the other hand, New South Wales used proportional representation for lower house elections between 1918 and 1926, and then abandoned it because of its alleged complexity and failure to produce stable majorities. The truth seems to be that political instability and shifting party combinations are caused by other factors than the election system. The Tasmanian system gives adequate representation, does not destroy personal contact between elector and representative—(as did the proportional representation system of Weimar Germany)—and produces political instability only in circumstances where any system is likely to do so. Since 1940, electoral opinion in Tasmania has been almost equally divided and consequent near-equality of party strength in parliament has caused instability. In 1955 an amending Constitution Act provided that if at a general election two parties are returned with equal numbers, the Electoral Commissioner should certify which party receives the larger number of primary votes. The 'minority' party is then *compelled* to provide a Chairman of Committees and *requested* to provide a Speaker; if it complies with the latter request, the 'majority' party is thus assured of a majority of one on the floor of the House. If the minority party declines to provide a Speaker, the majority party does so and an additional member is declared elected from the constituency of the Speaker so chosen, by count-back of the general election figures; the majority party must pick a Speaker from a constituency which will give it an additional member and a working majority by this route. (At the general election of 1955, Liberal and Labour were returned with 15 members each, Labour was certified majority party, and the Liberals supplied a Speaker).

In Tasmania, there are usually no by-elections. A casual vacancy is filled by the candidate next on the preference list from the last general election who is still qualified and willing to sit. This is economical, but deprives the parliament of that sensitive indicator of the trend of electoral opinion provided in the other electoral systems by by-elections. The federal upper house casual vacancy provision is also peculiar; an interim Senator is elected by a joint sitting of the state houses in the state where the vacancy occurs; if those houses are not sitting, the state cabinet—(formally, the Governor and Executive Council)—appoints a Senator to hold office until a joint sitting can be held. This is another reminder that the federal upper house is supposed to represent the states as such.

As already mentioned, the lower house election laws all enforce the principle of one man, one vote ; so do the federal, Victorian and South Australian upper house election laws. In Western Australia and Tasmania, upper house electors with qualifications in several constituencies may vote in each—(but may not vote more than once in the same constituency); this plural voting further strengthens the hand of property owners, but again is regarded as a minor matter compared with the 'special franchise'.

Australia has also widely adopted compulsory enrolment of electors and compulsory voting. These measures apply to those qualified to vote for the federal upper and lower houses, all the state lower houses and the Victorian and the Tasmanian upper houses. Neither enrolment nor voting are compulsory for South Australian and Western Australian upper house electors. The penalties for failure to enrol or to vote under the compulsion laws are very small—usually a fine of £2—but they have operated to secure a very high poll. In the last federal election before compulsory voting—(1922)—only 59 per cent of the electorate went to the polls, but since compulsion, the percentage has been over 90 per cent, and the experience of the states has been similar. Opponents of compulsion predicted that it would greatly increase informal voting and lead to electoral irresponsibility at the best and widespread corruption at the worst. Experience has not justified the first prediction ; percentages of informal votes under compulsory voting have at times been more, at times less than under optional voting, and federal election officials consider that political feeling, the complexity of the list of candidates and other such matters are the determining factors. Electoral corruption has certainly not increased—prosecutions for electoral offences of this type are very rare. Whether electoral irresponsibility has increased is a question which none can answer ; parties just defeated at the polls think it has and the successful party thinks otherwise. Certainly, nothing approaching the 'machine' politics known in some parts of the U.S.A. has been established in any part of Australia. Compulsory voting now seems to be part of 'the settled policy of the country'.

Australia began the use of the secret ballot for parliamentary elections, and this system—sometimes called in the U.S.A. the 'Australian ballot'—is now mandatory under all Australian election laws. Voting machines are not used, though South Australian state law authorises experiments in their use. Probably the present generation of Australians is hopelessly prejudiced against these contraptions by the only incident which has given them publicity in the Australian press ; that was the occasion at the U.S. presidential

elections of 1944 when a machine stuck and called forth profanity from the voter using it—the late President Franklin D. Roosevelt.

12. *Parties*

Australian political parties, like British ones, are private associations not recognised by the constitutions and uncontrolled by statute. The rules by which they regulate the admission of members, the drafting of a policy and the choice of candidates for parliament are their own affair, and are not even enforceable in the courts as private contracts. The system of direct primaries, that is state-controlled election of party candidates by registered party members, widely used in the U.S.A., has not been adopted. There has been occasional dissatisfaction with the way in which party candidates are endorsed, especially when party central executives have overridden the choice of constituency members. Each major party has a few 'safe seats', in which at election after election the important choice is not that made by the electors at the official poll, but that made by the dominant party when selecting its candidate ; the Labor Party is most fortunately placed in this respect, since its metropolitan industrial strongholds do not readily change their economic or political character. Nevertheless, these phenomena have never been sufficiently important to give rise to any movement for the adoption of direct primaries, and it is doubtful whether they ever will. No party has a long standing hold on any large region, as is the case in the U.S.A.

Over most of Australia, in both federal and state politics, there are three major parties — Labor, Country[1] and Liberal. As in Britain, they correspond roughly with economic and class groupings, not as in the U.S.A. with historical or regional groupings. The Labor Party grew out of the trade unions, and gains its largest vote from wage-earners. The Country Party gains its largest vote from farmers and pastoralists. The Liberal Party has developed from groups previously known as the 'United Australia' and the 'Nationalist' parties, and its main electoral support comes from the middle classes, though it also has a considerable following among white collar workers and farmers. In the past the Australian Liberal Party, or its predecessors, has been more like the British Conservative than the British Liberal Party, but reorganisation begun in 1945 may take it further left.[2] These generalisations, however, must at once

[1] The Western Australian state equivalent of this party is called the Country Democratic League.

[2] This is left unchanged from the first edition. The Liberal Party has remained predominantly conservative, but its democratic branch basis shows in such incidents as the refusal of some branches to support the Menzies-Fadden government's 1951 proposals for abolishing the Communist Party.

be qualified by three provisos whose effect is to make each of these parties more 'national' and less 'class' in character and programme than the above would suggest. Firstly, each party claims to be national in outlook and to present policies which will benefit, not merely the class from which its steady vote is drawn, but the people as a whole. Secondly, each party has and desires to hold a considerable 'cross-class' vote; many unorganised wage-earners and even trade unionists regularly vote Liberal, many professional and business people and farmers regularly vote Labour and many wage-earners and middle class people in country areas regularly vote Country Party. Thirdly, even larger than the *regular* cross-class vote is the cross-class *swinging* vote. These are the people who, attracted by the promises of one party or disgusted by the performance of another, or merely because thay think 'it's time the other gang had a fair go', create the political pendulum; the object of all parties at each election is to woo the swinging vote as much as to satisfy regular supporters.

This three party structure is subject to state variations from the main pattern. The most important is to be found in Tasmania and South Australia, where the groups which in other states support the Country and Liberal parties have fused to form one party.[1] There has been pressure to achieve this in all states,[2] and in the federal sphere the Country and Liberal parties usually have a working agreement. On the other hand, in Victoria the Country Party has sometimes collaborated with the Labor Party, and even the Liberal and Labor parties in that state have sometimes agreed on one point —the desirability of electoral redistribution. But the long term trend is for Country and Liberal parties to be forced together in opposition to the Labor Party on the issue of private *versus* state-controlled economic enterprise.

As against these centrifugal tendencies, all parties have from time to time suffered from splits, which sometimes result in the formation of new parties. In 1955, the Labor Party suffered such a split, the causes being differences over leadership, organisation and policy which had existed for many years, but were brought to a head by the special forms which opposition to communism within the party had taken since 1949. Until this writing, the split was confined to Victoria, South Australia and Tasmania, and had brought about in those States the formation of the Australian Labor Party (Anti-Communist), which then had two representatives in the Commonwealth Senate and one in the

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[1] Called in South Australia the Liberal Country League, and in Tasmania the Liberal Party.

[2] In 1949, a section of the Victorian Country Party joined with the Liberal Party to form a joint Liberal-Country Party on the S.A. model, but at this writing, a large section of the state Country Party remains outside this fusion.

Victorian Legislative Assembly. But the centrifugal tendency is dominant; such rebel groups usually re-join the party from which they split, or disappear from public life, or even (though this has been exceptional) join the other major party.

The Australian man in the street from time to time grumbles about the defects of party politics, and looks wistfully backwards or forwards to a time when none were for a party and all were for the state. For this reason, independents frequently secure election to parliament, and have often held a balance of power in the federal and state houses. Opinions differ as to the merits of such a political balance; much depends on the ability and integrity of the independents. Sometimes their 'discriminating support' compels the party in power to more care and intelligence in policy and administration than it would otherwise exhibit. At other times, the necessity for appeasing independents leads to irresolute government, or even to the promise of favours. The long term trend is for the electors to return to the support of one of the major parties. No electorate consistently returns independents.

'Her Majesty's Opposition' performs the same function in Australia as in Britain; it submits the work of the government to constant criticism, and constantly provides an alternative administration. Its great constitutional importance is officially recognised under federal law, and that of several states, by the grant of an additional parliamentary salary to the Leader of the Opposition.

13. *Cabinets*

Australia follows the British system of responsible cabinet government. This system requires that the Queen's representative should act on the advice of a cabinet of ministers, headed by a chief minister; that the ministers should individually be in charge of the various executive departments of state, and that the ministers should be members of parliament having the support of the majority party or coalition in the lower house. These rules are not set out *verbatim* in any Australian constitution. All the constitutions give a hint to the informed reader in their provisions prohibiting members of parliament from holding 'offices of profit under the Crown', that is, salaried positions in the executive government: these provisions exempt from the prohibition ministers of the Crown 'liable to retirement on political grounds', which means in practice that members of parliament can be paid an additional salary for acting as cabinet ministers. The federal, Victorian and South Australian constitutions are more explicit; they provide that cabinet ministers—(in South Australia certain named ministers)—must be members of

parliament or become such within three months of their appointment. The Western Australian constitution requires that *one* cabinet minister at least should be a member of the *upper house*; the South Australian constitution requires that *not more than four* ministers should be members of the lower house; the Victorian constitution requires that not more than *four* ministers shall be in the *upper house*, not more than *eight* in the lower house.[1] All these laws presuppose responsible cabinet government, but they leave some of its most important rules to convention; for example, the rule that the cabinet resigns if it loses the confidence of the lower house. The conventions governing these matters are as well observed in general and as much in dispute on certain details, as in Britain; British works on the subject and British precedents are freely cited when difficulties arise. A. V. Dicey's celebrated analysis of the working of conventions[2] states that they are observed chiefly because the parliaments authorise government expenditure in Supply and Appropriation Acts of short duration; hence a Governor or cabinet trying to carry on in defiance of parliament would soon be unable to pay government creditors, or would have to resort to illegal acts in order to do so. 'Dicey's sanction' has been criticised by Dr. Jennings[3] and others, but its operation has been demonstrated in several Australian political crises —notably the Victorian ones of 1865, 1878 and 1945. However, it is of course true that in normal circumstances the conventions of responsible government are observed because they are the rules of the game, familiar to the players and approved by public opinion. Leaving so many of the rules to convention instead of embodying them in statutes gives the political structure some flexibility, at the cost of some uncertainty.

The federal chief minister is called the Prime Minister; the state chief ministers are called Premiers. They are the most important people in Australian political life, the equivalents of the President and state governors in the U.S.A. The British Prime Minister has been called the 'keystone of the cabinet arch', and his Australian counterparts occupy a similar position. The rules of the Australian Labor Party give to the caucus of parliamentary members some of the authority which in Britain is usually given to the Prime Minister; for example, the choice of ministers—(but still leaving the allocation of portfolios to the chief minister). Some other parties have at times adopted similar rules, but in general other Australian parties follow

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[1] These provisions apply only to Ministers with Portfolio—not to Honorary or Assistant Ministers.

[2] *Law of the Constitution*, Part III, ch. XV.

[3] *Law and the Constitution*, ch. III.

British practice. However, circumstances have forced even upon Labor chief ministers a position of authority greater than the party rules envisage. Only the chief minister has a general view of the government's problems and ready access to all important state papers. The federal Prime Minister's Department is especially strong; its direct and 'top secret' relations with the British Prime Minister lead to its trenching on the sphere of most other departments, especially External Affairs and Defence. The federal Prime Minister also has to carry the main burden of relations with the state governments. The state Premiers acquire similar authority from their position on the Loan Council and the Premiers' Conference. The late John Curtin, federal Prime Minister in the critical war years 1941–1945, was an outstanding example of a chief minister having personal leadership thrust upon him by the office, in spite of his unassuming personality and his sincere endorsement of Labor Party principles of collective decision. Australian electors, like British ones, frequently vote as much for a prospective chief minister as for a party—especially the 'swinging voters'.

But the Australians, like the British, are very shy of giving the Prime Minister and Premiers any constitutional recognition. The New South Wales constitution does mention the office of Premier—in a schedule dealing with ministers' salaries. None of the other constitutions give the Prime Minister or Premier even this much honour; indeed, the South Australian constitution rather pointedly omits him from the list of ministers it requires to be members of parliament, though convention and political necessity demand that he above all ministers should be a member, and a member of the lower house. Otherwise, the chief ministers are mentioned only in a few separate statutes dealing with ministers' salaries and departmental duties.

Although the Australian constitutions only infer the existence of cabinets, and with one exception ignore the existence of chief ministers, they each establish a body which the uninformed reader might consider extremely important—namely the Governor-General or Governor's Executive Council, which seems on paper to be distinct from the cabinet of ministers. In fact, only ministers are appointed to the Executive Councils; in some states, a person once appointed continues to be nominally a member, but only the ministers of the day are summoned to Executive Council meetings. It is as members of the Executive Council that ministers take their oaths of office and are bound to secrecy. The functions of these councils are purely formal. Thus they bear a relationship to the cabinets similar to that which the British Privy Council bears to the British cabinet. There may

be some good reason why Australians should thus continue to imitate an historical eccentricity of the British constitution, but this writer has not been able to discover it.

The Australian constitutions enact another British convention which supports cabinet government, though is not peculiar to it; money bills must originate in the lower house, on a recommendation from the Governor-General or Governor—meaning in practice the cabinet—and may be rejected but not amended by upper houses. The general purpose of this is to give the executive a reasonable control over the public purse, but the upper house provision also has some connection with deadlocks; the idea—(not wholly justified on some Victorian and Tasmanian experience)—being that the upper house will not lightly court unpopularity by rejecting money bills outright and so threatening the disruption of public business. The upper houses may, however, *suggest* amendments in money bills.

As already indicated, some of the constitutions have express provisions about the allocation of cabinet ministers between upper and lower houses. Apart from these provisions, political expediency demands in all cases that whenever possible both houses should be represented in the cabinet. In the federal sphere, there is also a strong convention that the cabinet should if possible contain representatives from each state. This convention probably gives the states as such more effective representation in federal activities than any express provision of the federal constitution.

The size of Australian cabinets varies from time to time, since ministers sometimes hold several portfolios—state Premiers nearly always hold as well the Treasury portfolio—and ministers without portfolio or 'honorary ministers'[1] are sometimes included. The following table shows the position in 1956.

Ministers in Australian Cabinets

Federal	N.S.W.	Victoria	Q'land	S.A.	W.A.	Tas.	Total
22	16	14	11	8	10	9	90

Until 1956, 'Cabinet' and 'Ministry' were in Australia interchangeable terms. But in that year, the Federal Liberal-Country Party coalition government introduced for the first time the modern English system of a Cabinet of senior Ministers (in this case numbering 12), leaving the other Ministers (numbering 10) out of Cabinet. It is not

[1] And in some cases 'Assistant Ministers'.

certain that a Labour administration would continue this innovation, and it *is* certain that the system will not be worked on quite the same lines as in the United Kingdom, because occasional meetings of the full muster of Ministers have been held and are likely to be held to discuss critical matters (which does not happen at Westminster) and in other ways the distinction between Cabinet and Ministry is likely to be blurred.

Ministers with portfolio are paid allowances in addition to their salary as members of parliament. The highest is that paid the federal Prime Minister—making his total salary and allowances in 1956 something over £10,000 p.a. It is not especially generous having regard to the work and responsibilities involved.

14. *The Civil Service*

The seven parliaments and cabinets make their rule effective through seven civil services. As in Britain, these are generally speaking recruited by competitive examinations, classified into grades, promoted by principles of merit and seniority—(seniority being in practice more important)—organised into departments, disciplined by departmental heads with an appeal to a discipline board and given security of tenure and pension rights. There are many differences between the conditions of the seven services. All accept the principle of control by an authority appointed by the cabinet but removable only by parliament. Under federal, New South Wales and Victorian law, this authority is vested in a board of three commissioners; the other states have single commissioners. In New South Wales and Queensland, the commissioners hold office until they reach 65, but the federal and the other state commissioners hold for from 5–7 years. There have been acrimonious debates about these and other local variations, but the following are the main points of distinction between the Australian services as a whole and the British service.

Firstly, all the Australian systems are embodied in statutes—not, as in Britain, in prerogative regulations. Hence the rights and privileges established by the Australian systems are enforceable in the courts; for example, a civil servant dismissed otherwise than in the manner prescribed by the statutes can sue the relevant government for damages, which is not generally possible under the British regulations.

Secondly, only the federal statute permits the recruitment of university graduates to an advanced grade of the service. Otherwise, the only exceptions to recruitment at a junior grade and promotion

within the service are some provisions giving returned servicemen special advantages.[1]

Thirdly, there has been a long-term tendency to remove control of civil service salaries from the cabinets, commissioners and heads of departments, and vest it in arbitration tribunals. This has been a major political issue all over Australia. Some Civil Service Commissioners and non-Labour governments have opposed civil service arbitration on the grounds that independent tribunals, dealing with sectional claims, tend to establish anomalies and so increase grievances, and that the government's control over its budget is weakened. The case for arbitration is the same as for arbitration in general, governments being no better judges of their employees' claims than other employers. The federal service has a special Public Service Arbitrator. The Queensland, South Australian and Western Australian governments submit to arbitration by the state Industrial Courts which handle all employer-employee disputes under state law. The New South Wales government has also submitted to state Industrial Court arbitration, but only for the fixing of *minimum* rates of pay. In 1946, the Victorian parliament accepted the arbitration principle and appointed three separate special tribunals—one for the police force, one for teachers, and one for the rest of the public service. Tasmania has not accepted the principle, and its Upper House as at present constituted is not likely to approve it.

These principles have also, generally speaking, been applied to the trading organisations of Australian governments whose employees do not come under the Public Service Acts, of which the most important are the federal and state railways. In this sphere, the arbitration problem has been simplified—(and State budget problems increased)—by the jurisdiction of the federal Arbitration Court over state industrial employees who form interstate unions, and have disputes with more than one state government or authority at a time.

The Australian civil services have acquired a reputation, similar to that of the British service, for general ability and trustworthiness. However, it is probably fair to say that the Australian services do not enjoy quite the social prestige of the British. Canberra is a city of civil servants and accordingly eminence in the service does tend there to establish social standing. A few federal and state department heads have been rewarded for faithful and efficient service by honours and social prestige recognised even in the state capitals. But although the average level of civil service salaries is higher than in Britain, the

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[1] For a detailed account, see *Public Service Recruitment in Australia*, by R. S. Parker (Melbourne University Press, for the Australian Council for Educational Research).

maxima are not nearly so great—£5,000 per annum is exceptional. This lack of glittering social and monetary prizes for public service is regretted by some on the ground that it discourages able and ambitious men, but is praised by others because it eliminates 'snob' elements from the services.

The number of civil servants in Australia is said to be higher in proportion to population than is the case in Britain and the U.S.A. It is difficult to make any satisfactory comparison, since Australians regard as 'government employees' the staffs of government railways, banks and other trading organisations, of the state educational systems, and of statutory corporations carrying on government work. None of these are included in the U.S. or British figures, either because of differences in administrative organisation or because no such nationalised services exist. If we include only 'civil servants' in the restricted American and British sense of the term, we get the following very approximate comparison for 1939, in round figures.

Civil Servants per Head of Population

—	Australia	Great Britain	U.S.A.
Total of Civil Servants	92,000	390,000	1,500,000
Proportion of Civil Servants in population	1 in 76	1 in 123	1 in 87

The Hitler-Hirohito war caused a great increase in the federal service and reductions in some state services, and no useful comparisons can at present be made later than 1939. In 1947, the total number of persons employed by the seven governments of Australia and by municipalities was about 557,000.[1]

15. *Government by Civil Service*

The phenomena condemned by Lord Chief Justice (Viscount) Hewart as the *New Despotism*, and by Dr. C. K. Allen as *Bureaucracy Triumphant*, and more soberly analysed in the British 1932 *Report of the Committee on Ministers' Powers*, are prominent in Australian government. Nearly every statute, federal and state, gives to the executive a power to make regulations, and many statutes give officials discretionary powers affecting the rights of the subject. Before 1940, the bulk of *published* executive regulations in Australia each year was about four times that of the statutes passed by the parliaments—and only regulations having some general importance for the public were published. The number of administrative or

[1] Of these about 28 per cent were in federal service, 62 per cent in state government service and about 10 per cent in municipal service.

quasi-judicial tribunals was also steadily expanding as the various parliaments brought under official regulation, zoning, rationalisation and inspection many different trades and professions, from distributing milk to making jokes on the radio.

These developments are as inevitable in Australia as elsewhere, because the detailed application of accepted social policies requires time, knowledge, patience and flexibility of procedure not possessed by the parliaments. The Pacific war greatly increased the scope of these problems, and with them the volume of regulations and the number of administrative discretions—especially under federal law. The expansion was disorderly and ill-planned, because of the urgency, and a thorough investigation of possible control methods is now long overdue.

Regulations are subject to a limited judicial control, since the courts will not enforce a regulation unless it is 'with respect to' the matters specified in the empowering statute. There are very few examples in Australia of parliaments trying to exclude such judicial control. But this method depends for its effectiveness on some citizen having the money and the courage, or obstinacy, to take the matter to court. Two basic federal war regulations—dealing with interstate traffic and property sales—were enforced for three years before a pair of heroic litigants had them declared 'ultra vires' in the High Court. Parliamentary control can and should be more effective, since it can be continuous in operation and deal with the *expediency* of regulations as well as their legal validity. Effective parliamentary control requires in the first place that regulations may be quashed by a simple resolution of either house; otherwise the cumbrous machinery of legislation is required, and the matter is debated on strictly party lines. This condition is satisfied by federal law, and the law of each state excepting Victoria. Federal, South Australian Western Australian and Tasmanian law have the simple and sensible device of a uniform provision in the Acts Interpretation Act, requiring tabling of regulations and empowering either house to disallow; New South Wales and Queensland follow the more cumbrous method of including a special clause to that effect in each separate statute giving regulation-making powers. Victoria was in 1956 still woefully behind the times in this matter; its statute law has no general provision, and the separate clauses in each statute conferring regulation-making powers mostly provide that regulations shall be tabled in parliament—without giving the Houses any power of disallowance. Effective parliamentary control requires secondly that there be a standing all-party committee, at least of one House and preferably of both jointly, charged with scrutinising regulations in a non-party

spirit and with carrying on this work when parliament is not sitting. The federal and South Australian parliaments have experimented in this direction. However, with Australian parliaments their present size, it is not easy to obtain enough men with sufficient time and ability to carry out these important duties.[1]

The courts also exercise some control over administrative discretions; they can prevent administrative tribunals from exceeding their powers, check at least the grosser forms of bias, and insist on some elementary rules of natural justice in administrative procedure. Even this much control is sometimes excluded by Australian statutes, since interference by courts may introduce the very expense and delay which administrative decision was intended to eliminate.[2] No completely satisfactory method of controlling administrative discretions, or of providing an appeal from administrative decisions, has yet been devised. Australian statutes provide appeals from one official or set of officials to heads of departments, to ministers, to the Governor-in-Council, to special tribunals both official and non-official and to the ordinary courts—if they permit any appeal at all. There is a pressing need for more uniformity of parliamentary draftsmanship and official procedure in these matters.[3]

16. *Justice*

The structure of the Australian legal systems is derived from, and still closely follows, that of England. Besides the law made by parliaments and their delegates, there is the unenacted or common law, inherited from the English courts and since developed by Australian courts; the latter still pay high regard to English judicial decisions, and in particular treat decisions of the English House of Lords as equal in authority with those of the Privy Council.[4] The Australian judicial system is closely modelled on that of England. Besides the High Court of Australia already mentioned, there are other subordinate federal courts. The federal parliament could create a complete system of federal courts, but has preferred to vest

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[1] The federal Senate Committee once found itself relying on the devoted services of a single Senator; when he lost his seat, the Committee was obliged, for some time, to retain his services in a consultative capacity.

[2] Judicial control under present procedure may also tend to cause undesirable administrative practices. The public interest demands that administrative tribunals should give full reasons for their decisions. But administrators are aware that the less they say, the less likely is it that their decisions can be successfully challenged in the courts.

[3] The federal constitution imposes some limits on the powers which can be given to federal administrative tribunals. The law on this matter is both technical and obscure, but the general principle is that powers ordinarily exercised by courts cannot be given to officials.

[4] Properly speaking, the Judicial Committee of the Privy Council.

jurisdiction over most federal matters in state courts. Each state has a Supreme Court and a system of subordinate courts with a variety of names—Courts of Petty Sessions, Quarter Sessions and General Sessions, District Courts, Local Courts, County Courts and so on. Supreme Court judges, like High Court justices are appointed by the executives, but can be removed only by the respective parliaments. The judges and magistrates of inferior courts are both appointed and removable by the executives, but convention secures to them a high degree of immunity from executive interference. No important party has ever advocated elective judges or magistrates. Unpaid justices of the peace, usually without legal training, are extensively used in subordinate courts; this was inevitable in earlier times, but now begins to look like justice on the cheap, and accordingly the trend is to reduce the number of cases in which such justices have jurisdiction and to employ paid, trained magistrates variously called police, stipendiary and special magistrates. Juries are used in the trial of the more serious types of criminal prosecutions; they are not used in petty criminal courts, and only to a limited extent in civil cases.

Certain cases may be begun in the High Court, but most cases reach it on appeal either from other federal courts, or courts exercising Federal jurisdiction, or from the state Supreme Courts. The High Court is a general court of appeal from the state Supreme Courts; it is not confined to cases having a federal or constitutional character, but appeals are limited by reference to the amount of money in dispute, or the seriousness of an offence charged, or the difficulty and public importance of a legal issue raised. Appeal is still possible, as a matter of law, from state courts direct to the Privy Council, but in practice such appeals hardly ever occur. In the first twenty years of federation, there was an acute difference of opinion between the Privy Council and the High Court as to general principles of constitutional interpretation;[1] in consequence, the federal parlia-

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[1] The High Court considered that the federal structure of the constitution required the Court to *imply* restrictions on federal and state powers; the Privy Council thought that the various *express* prohibitions of the constitution were sufficient. The High Court's doctrine was borrowed from decisions of the U.S. Supreme Court. In 1920 (The Engineers' Case), the High Court reversed its previous decisions and adopted the view of the Privy Council, though for different reasons. But in 1947, by yet another dramatic shift of interpretation, the High Court established an 'implied prohibition' against state and federal governments interfering with each other's essential functions (the State Banking Case); the Court again relied largely on U.S. decisions (especially the Saratoga Springs Case of 1945–6). The pre-1920 doctrine tended to restrict federal power, and its abolition facilitated the expansion of federal power. The 1947 decision might lead to further restrictions of federal power, or at least to a stabilisation of the present balance, but it cannot affect the financial superiority of the federal government.

ment enacted laws to ensure that all cases involving constitutional issues should reach the High Court. There is a limited right of appeal from the High Court to the Privy Council ; in certain important types of constitutional disputes, the leave of the High Court itself is necessary, and this is rarely given. Up to 1956, the Privy Council had decided only fourteen major cases on the interpretation of the federal constitution. It cannot be said that the High Court has been particularly successful in making clear what the federal constitution has left unclear ; there have been sharp differences of opinion between the justices, due in some cases to clashes of temperament, and the court has on several occasions overruled its own previous decisions.[1] As Dixon J. said in one connection, 'what has been clear has not found acceptance, and what has been accepted has yet to be made clear'. But the obscurity of much of the judge-made law on the federal constitution is inevitable ; it arises from the generality, and in some cases the obscurity, of the language of the constitution, and from the fact that the constitution in some cases imposes on the courts duties which are administrative rather than judicial in character —for example, the policing of the requirement that 'trade, commerce and intercourse between the States shall be absolutely free'. Although conflicting High Court decisions are a terror to the law student, they may be, in the long run, a boon to the community, since they have the practical effect of giving the constitution some flexibility. It is a question of degree at any particular time whether certainty and predictability of judicial decisions are more important than the ability to adjust the law to changing circumstances. Since 1920, the High Court has perhaps erred a little on the side of flexibility. The Privy Council, however, has been no more successful in making clear what was obscure. It is more in accordance with national sentiment and certainly cheaper for litigants, that the High Court should be for practical purposes the final court of appeal on constitutional cases.

There has been frequent public and parliamentary discussion of the power of reviewing legislation possessed by the High Court, and suggestions have been made that parliament, not the Court, should be the final arbiter on such questions. It should be observed, however, that the power to declare statutes unconstitutional is not confined to the High Court ; it is possessed by all the courts. And this principle of judicial review does not apply only to the federal constitution or to statutes of the federal parliament ; it applies equally to the state

[1] But the Court's work in other fields has contributed greatly to the development and uniformity of Australian law. The justices individually have represented the cream of the Australian legal profession, and have frequently been on corresponding terms with the most eminent of their British and American opposite numbers.

constitutions, and to the validity of state legislation under both the state and the federal constitutions. As in the U.S.A., judicial review is a fundamental feature of the present constitutional system. A major operation would be needed to abolish the principle, or even to reduce its ambit.

17. *Local Government*

Over a large part of the Australian interior, population is too sparse to require or afford institutions of local government. The more closely settled portions of each state, however—including the whole of Victoria and Tasmania—are divided into districts, municipalities, shires, townships or cities, in accordance with area and population. The state parliaments control these local governments, and the details, which vary from state to state, have to be sought in the six sets of local government acts. The general pattern is taken from British practice; local councillors have power to make and carry out by-laws on such matters as roads, traffic, drainage, sanitation, buildings, noxious weeds and so forth. Western Australia also has separate 'Roads Boards'. The chief difference from British practice is that except in New South Wales there is nothing to correspond with the British County Councils, superimposed on the basic local government corporations. There have been strong movements to create a single metropolitan authority in each of the capital cities, instead of or over the many municipal areas into which those capitals are by law divided. By 1951, this had been done only in Brisbane and Sydney.[1]

There are also many statutory corporations for special purposes, such as water and drainage boards, central road boards to control trunk highways, and electricity commissions. Some are local in character, some have state-wide jurisdiction. They form a rich field for the student of public administration, since no two are organised alike.

18. *Federal Territories*

Besides its limited competence in the areas comprised by the six states, the federal parliament has a supreme and sole authority over some huge but sparsely settled areas, of which the chief are the Northern Territory and Papua[2]—and of course over the small piece of land carved out of southern New South Wales containing the Australian Capital Territory. The Northern Territory and the Capital Territory each send one representative to the federal parlia-

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[1] The Sydney authority is called the Cumberland County Council.

[2] The federal government also controls Australian trusteeships, of which the chief are former German areas in New Guinea and adjacent islands.

ment, but they have a vote only on issues concerning their respective electorates.[1] In 1947, the Northern Territory entered the first stage in the development of self-government, similar to the stage through which each of the states passed in the nineteenth century. A Legislative Council was set up consisting of the Administrator, who is appointed by the federal cabinet, seven official members nominated by federal cabinet, and six elected representatives of the people. The Council has power to make ordinances for the peace, order and welfare of the Territory, but the power is subject to the veto of the Administrator, who may also reserve ordinances for Canberra approval. Thus the Administrator has in law and in fact powers similar to those which the state Governors have in law. The other territories have no parliamentary representation. In 1953, Papua and New Guinea, the chief federal island territory, acquired a Legislative Council similar in authority to that of the Northern Territory, but with a higher proportion of official and nominated members. The Capital Territory is governed by the Minister for the Interior. Some pessimistic 'state-righters' consider the Northern Territory as an example of the status which the six states will eventually occupy.

19. *The Liberty of the Subject*

Generally speaking, Australia has not followed the American and European practice of embodying 'fundamental liberties' in written constitutions. The federal and Tasmanian constitutions contain provisions guaranteeing religious toleration, but these guarantees restrain only the federal and Tasmanian parliaments and governments respectively. Otherwise the fundamental democratic liberties—security of the person, freedom of expression and freedom of association—have the same standing as in Great Britain. They exist in so far as the law for the time being does not restrict their ambit by prohibitions or by the grant of a discretionary power of prohibition to government officials, and the onus of proof is on a party alleging a prohibition. So far as these liberties exist, they are adequately protected, at least in peace-time, by the traditional common law remedies, such as habeas corpus and actions for assault and false imprisonment, which are applied against ministers and bureaucrats as boldly as against private individuals.[2] But the parliaments can

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[1] They are additional to the 121 federal lower house members previously mentioned.

[2] See *R. v. Carter, ex. p. Kisch*, 52 *Commonwealth Law Reports*, 221. In time of war, federal regulations authorise internment without trial at the discretion of a minister, but in World War II a system of administrative tribunals was created to advise the minister in the exercise of this power.

abridge these liberties as they please, by increasing either the number of statutory prohibitions, or the number and scope of administrative discretions ; and the parliaments can restrict or suspend the available remedies against the invasion of individual liberty. In peace-time, the Australian courts, like the British, interpret restrictive statutes in favour of the subject. In war-time, this presumption is much weaker. But at all times the preservation of a reasonable degree of individual liberty is in the last resort the responsibility of the electors.

A description of the actual extent of individual liberty in Australia would require firstly a comprehensive account of all the laws, state and federal, which in some way restrict the individual's freedom of action. In relation to political activities, the most important of these laws are those dealing with sedition, defamation, meetings in public places, and the reporting of parliamentary and judicial proceedings and elections. Secondly, it would be necessary to examine not only the law, but the policy followed by police and other law-enforcement agencies. The law tends to be stricter in theory than it is in application. For example, the federal Crimes Act, 1914-1932, Section 24A, defines sedition as including the promotion of 'feelings of illwill and hostility between different classes of His Majesty's subjects, so as to endanger the peace, order or good government of the Commonwealth'.[1] A good deal of political propaganda could be regarded as seditious on this principle, but in fact prosecutions are very rare. Similarly, public meetings and processions in the streets are usually prima facie illegal under municipal by-laws, if not at common law. Whether they can be held depends upon whether police or municipal authorities are likely to prosecute or not. And thirdly, it would be necessary to study the methods of trial used for different offences. Juries convict less readily than magistrates, and many offences of a 'political' character are difficult to prove. The federal Crimes Act contains a number of provisions with respect to unlawful associations, which were intended to repress extreme left-wing organisations and militant trade unions without resorting to trial by jury, and with the aid of evidentiary provisions making the averments of the prosecution prima facie evidence of the facts stated.[2] But these provisions have never been successfully invoked. In general, Australian law adequately protects security of the person, and in practice allows a very wide liberty of expression[3] and association.

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[1] But the section provides that it is lawful to point out, in good faith and in order to their removal, matters tending to cause such ill-will and hostility.

[2] Such a provision does not, technically, place upon the accused the burden of proving his innocence, but its practical effect tends in that direction.

[3] In peace-time, the only true press censorship is that exercised by the federal Customs Department over imported publications. Moving pictures,

Nevertheless, it is a commonplace of Australian political propagandists to complain that Australians are losing their liberties. These critics are referring not to the fundamental liberties mentioned above, but to rights and liberties concerned with the ownership and disposition of property and the pursuit of various gainful occupations. The federal constitution requires the federal government to pay just compensation for any property it acquires from a State or an individual. This is the only direct protection which the Australian constitutions afford to property rights. The federal constitution contains other prohibitions addressed to the federation or the states or both, whose primary purpose is to preserve the federal structure, but which incidentally provide some protection to property rights. The most important is Section 92, which requires that 'trade, commerce and intercourse among the States shall be absolutely free'. The High Court has reconciled with this prohibition a good deal of government regulation of interstate trade, but the section has operated to prevent some forms of interference with private enterprise: for example, the prohibition of privately owned interstate air transport services.[1] To some extent, the whole structure of federalism in Australia protects property interests. Owing to the economic integration of Australia, and the superior financial position of the federal parliament, any very far reaching socialist scheme would require joint action by the federal parliament and the parliaments of several states. Such co-operation is difficult to achieve under any conditions, and almost impossible so long as several state upper houses have continuous conservative majorities. Hence it is becoming increasingly the case that arguments for and against increased federal powers develop into arguments between socialists and anti-socialists. The former tend to favour federal power, because there is a reasonable chance of the Labor Party securing majorities in both federal houses, with the necessary financial resources and ability to nationalise on a national scale. The anti-socialists, for the same reason, tend to favour state rights. Save as above, property rights and the pursuit of various occupations are in Australia subject to a great deal of government prohibition or regulation. These economic liberties, moreover, are not protected as are the fundamental personal and political liberties by any overwhelming weight of public opinion.[2]

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however, are strictly censored. In 1954, Queensland established a censorship board with power to ban obscene and sadistic publications, with appeal from its decisions to the Supreme Court.

[1] Section 92 was also a major factor in the invalidation of the federal Labor government's bank nationalisation Act in 1948-49, but it is possible that this particular obstacle might have been overcome if the legislation had been differently drafted.

[2] In industries governed by state law, Queensland and N.S.W. have estab-

20. *Amending the Constitutions*

All the Australian constitutions trace back to British statutes, and in legal theory the parliament at Westminster could repeal or amend any of them. But by a scrupulously observed convention, the British parliament does not exercise that power unless requested to do so by the Australian government or governments concerned. The Statute of Westminster, 1931, expressly states this convention, but the statute applies specifically only to the federal constitution, while the convention applies equally to the states. In 1934, Western Australia petitioned the British parliament to pass an act to enable the state to secede from the federation. The British parliament refused even to hear the petition, since it was opposed by the federal government, whose rights would have been affected.

But the constitutions each contain provision for their amendment in Australia, and in the case of the states, these powers have been clarified and extended by two other British acts—the Colonial Laws Validity Act, 1865, and the Australian States Constitutions Act, 1907.

In Queensland, Tasmania and New South Wales, the state constitutions can in general be amended by the state parliament itself, without any special formalities—that is, with the same ease as a Dog Act. But in Queensland the approval of the electors at a referendum is required either to *restore* the upper house, or to prolong the duration of a parliament beyond three years, while in New South Wales, the like approval is required to *abolish* the upper house, or alter its structure and authority.[1] The Victorian, South Australian and Western Australian constitutions can also be amended by the parliaments they establish, but amendments must pass by absolute majorities; in practice, the chief check on constitutional amendment in these states and in Tasmania is the necessity for securing the assent of the upper house. The state constitutions also require the reservation of amending bills for the Queen's own assent, but this relic of colonial days has ceased to be important; the Queen always assents if the state cabinet desires it. A substantial restraint on all these amending powers is the federal constitution itself; any purported amendment of a state constitution conflicting with the federal constitution or laws made under it would be void.

Apart from some minor machinery provisions, the federal constitution can be amended only by an act which after passing through the parliament is approved by a majority of the electors as a whole, *and also* by a majority of the electors in each of a majority of the

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lished compulsory trade unionism—a policy touching both economic and political liberty.

[1] In 1950, N.S.W. further amended its constitution to require a referendum for extending the duration of lower house membership beyond three years.

states (that is, in four states); certain amendments affecting the constitutional rights or the boundaries of states require the assent of a majority in the states concerned, so that in some circumstances a majority of electors in *every* state would be necessary. The constitution also contains a provision to ensure that an amendment proposal initiated by either house *may* be put to the electors, notwithstanding the opposition of the other house; in practice, the convention requiring the Governor-General to act on the advice of ministers would probably confine the operation of this provision to proposals initiated by the lower house.

The ambit of federal power can also be increased by states 'referring' matters to the federal parliament under Section 51 or ceding territory to the federal government under Section 111 of the Federal Constitution.

21. *Conclusion*

Until 1954, no comprehensive work on Australian government had been written, and most of the specialised works are out of date and print, or are addressed exclusively to lawyers or school-children. Australia still awaits its Dicey, its Bagehot, its Jennings, its Bryce and even its Brogan. But Mr. J. D. B. Miller's *Australian Government and Politics*, written by an Australian in England, has at last begun a satisfactory tradition in this matter. Moreover, the Australian citizen is better able to study at its source the constitutional law under which he lives than his British brothers, since the greater part of that law is both enacted in statutes, and gathered together in statutory consolidations or reprints. Only Western Australia lacks a complete statutory consolidation; its constitution acts in particular have to be traced right back to the original Act of 1889. The other bodies of statutory law were most recently consolidated or reprinted at the following dates: federal, 1953; New South Wales, 1938; Victoria, 1928 (with a fresh consolidation in preparation); Queensland, 1936; South Australia, 1936[1]; Tasmania, 1934. It is of course necessary to check for amendments after those years. It is also necessary to check on this survey after 1956, since amendments to many aspects of Australian government are being vigorously discussed. In 1956, the federal parliament appointed a joint all-party committee to explore the possibility of finding generally acceptable proposals for constitutional change. Since the first edition of this work in 1948, many changes have occurred in the detail of Australian government, particularly state government. In this sense, change may seem inevitable, but to adapt a saying of Mr. Justice H. V. Evatt, as he then was, it seems a very gradual inevitability.

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[1] Constitution Act reprinted as amended in 1949.